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Smoking in the Workplace: Accommodating Diversity*

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Historically, individuals who smoked typically felt free to do so when and where they pleased. Indeed, smoking in public places, including places of work, was generally unrestricted. Today, however, the interests of smokers and nonsmokers often compete on the job. This is especially true in workplaces where employees work side-by-side for long periods of time. While some employees adamantly seek to preserve their "right" to smoke on the job, other nonsmoking employees are pushing for a "right" to a smoke-free work environment. And, while smoking disputes are still generally resolved informally by management, now legislatures, courts, and unions have become embroiled in the controversy.

In this article, the authors present an overview of workplace smoking issues by surveying relevant case law, analyzing state and local legislation, and addressing the prominent role of unions regarding smoking in the workplace. In addition, the authors offer practical suggestions to employers about how to accommodate the competing interests of both smokers and nonsmokers. In doing so, the authors hope to assist employers in resolving workplace smoking issues.

Eighty-eight percent of all employers in the United States permit smoking in the workplace.[1] Of those employers that permit smoking, approximately one-half currently have no formal smoking policy.[2] Twelve percent of major employers in the United States ban smoking on the job. The vast majority of employers permit smoking somewhere on company premises. Fifty-one percent prohibit smoking in open work areas and shared work spaces.[3] Of the employers that ban smoking in the workplace, many appear to do so around food preparation stations or where employees work near combustible materials. For example, gasoline refineries and chemical processing companies ban smoking almost uniformly due to the severe safety considerations attendant to those workplaces. Similarly, product contamination concerns led the Campbell Soup Company to ban smoking in the workplace beginning in approximately 1896.

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[1] BNA, "Where There's Smoke: Problems and Policies Concerning Smoking in the Workplace, A Special Report" 20 (2d ed. 1987) (hereinafter BNA, Special Report).

[2] According to one survey of 1,100 employers, 63.8 percent have no formal smoking policy. A more recent survey of 623 employers indicated that 43 percent have no such policy. See infra note 73 and accompanying text.

[3] BNA Special Report, supra note 1, at 20.

Judicial Response

In general, the courts have been quite hostile to the claims of nonsmokers seeking a legal right to a smoke-free work environment. That same conclusion also appears to be emerging in the new wave of "smokers' rights" cases. The consensus of the courts appears to be that, absent any legislative limitation on management's discretion, employers need to accommodate the competing interests of both smoking and nonsmoking employees. For example, management must accommodate "handicapped" employees who are found to be medically "hypersensitive" to environmental tobacco smoke.[8] On the other hand, unionized workers may have a right to smoke unless and until management has bargained in good faith to limit smoking in the workplace. At the same time, management must comply with any state statutes or local ordinances that may address smoking in the workplace.

Inevitably, employers find themselves positioned between the competing interests of smokers and nonsmokers alike. In this situation, employers are well-advised to promptly and effectively accommodate these competing interests so as to avoid disruptive battles between employees. In some situations, employers may consider voluntarily formulating a reasonable smoking policy to assist them toward this end.

Workplace smoking issues have been litigated in the courts in a variety of contexts. Beginning in 1976, nonsmokers filed the first of a series of "test cases" seeking the legal right to a smoke-free work environment.[9] With a few limited exceptions, the courts have been hostile to the claims of healthy nonsmokers seeking a legal right to a smoke-free work environment. Instead, the general response of the courts has been that this is an issue best left to management discretion or the legislative process.[10]

Constitutional Claims

The courts have summarily rejected the notion that employees or members of the public have a constitutional right to an environment free of tobacco smoke. In the leading decision, *Gasper v. Louisiana Stadium and Exposition District*,[11] a group of nonsmokers sought to prohibit smoking during sports and other public events at the Louisiana Superdome. The plaintiffs claimed that their exposure to tobacco smoke in the Superdome infringed upon their rights guaranteed by the U.S. Constitution. Specifically, the plaintiffs in *Gasper* alleged that exposure to tobacco smoke at the Superdome infringed upon their First Amendment right to receive ideas; deprived them of life, liberty, and property without due process in violation of the Fifth and Fourteenth Amendments; breached their fundamental privacy rights guaranteed by the Ninth Amendment. The court rejected each of the plaintiffs' constitutional arguments and stated that to hold that the Constitution prohibits smoking would be to create an unprecedented avenue "through which an individual could attempt to regulate the social habits of his neighbor."

(Footnote Continued)

Indoor and Ambient Air Quality Conference, *Imperial College* (London, England, June 13-15, 1988) [hereinafter Proceedings].

See also Comment, *Judicial and Legislative Control of the Tobacco Industry: Toward a Smoke-Free Society?* 56 U. Cin.L. Rev. 317 (1987); and Crist & Majoras, *The "New" Wave In Smoking and Health Litigation—Is Anything Really So New?* 54 Tenn.L. Rev. 551 (1987).

[8] See *Paradi v. Merit Sys. Protection Bd.*, 702 F.2d 743, 749-51 (9th Cir. 1982); see also infra note 27 and accompanying text.

[9] See *Shimp v. New Jersey Bell Tele.*, 145 N.J. Super. 516, 368 A.2d 408 (1976).

[10] See, e.g., *Federal Employees for Nonsmokers' Rights v. United States*, 446 F.Supp. 181, 185 (D.D.C. 1978), aff'd 598 F.2d 310 (D.C. Cir. 1979), cert. denied, 444 U.S. 926; *Gasper v. Louisiana Stadium & Exposition Dist.*, 418 F.Supp. 716, 722 (E.D. La. 1976); *McCarthy v. Department of Social and Health Servs.*, 110 Wash. 2d 812, 826, 759 P.2d 351, 358 (1988).

[11] 418 F. Supp. 716 (E.D. La. 1976), aff'd 577 F.2d 897 (5th Cir. 1978), cert. denied, 439 U.S. 1073 (1979).

Statutory Claims

Nonsmokers have relied upon numerous statutes attempting to limit smoking in the workplace or, alternatively, to obtain financial benefits if they believe they cannot continue working in the presence of tobacco smoke. These statutory bases include federal and state handicap laws, disability statutes, and workers' compensation laws.[19]

Despite these attempts, the courts have generally refused to restrict workplace smoking. Some courts, however, have held that employees claiming severe adverse reactions to tobacco smoke are "handicapped" or "disabled" or may be able to recover workers' compensation benefits.

In *Vickers v. Veterans Administration,*[20] the court found that an employee was "handicapped" within the meaning of Section 504 of the Federal Rehabilitation Act of 1973[21] when it found him to be "hypersensitive"[22] to tobacco smoke and physically unable to perform his job in the presence of environmental tobacco smoke.[23] In *GASP v. Mecklenburg County,*[24] however, the court rejected similar claims, cautioning that the term "handicap" was *not* intended to include all persons who claim to suffer from a pulmonary problem, however minor, or those who are simply irritated by tobacco smoke.

In the workers' compensation context, a California court has held that a nurse who left her job because of "allergic" reactions to tobacco smoke was eligible for unemployment compensation until she could find alternative employment in a smoke-free environment.[25] A Louisiana court has denied unemployment benefits under similar circumstances because it found that the employee's preexisting allergy, which was not aggravated by her employment, did not constitute "good cause" for her resignation.[26]

In *Parodi v. Merit Systems Protection Board,* a federal employee who claimed to

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[19] The Occupational Safety and Health Act (OSHA), 29 U.S.C. §§ 651-678 (1982) currently provides no remedy for nonsmokers seeking a smoke-free work environment. Tobacco smoke is not listed by OSHA as a "toxic and hazardous substance." See 29 C.F.R. § 1910.1000-1910.1500 (1988). Indeed, in 1987 OSHA denied a citizen petition requesting OSHA to classify tobacco smoke as a potential occupational carcinogen and develop a standard for "tobacco smoke." BNA, Daily Report for Executives at A-24 (Mar. 2, 1987). In addition, OSHA administrators have consistently refused to accept complaints based solely on workplace smoking and, thus, apparently do not perceive that environmental tobacco smoke constitutes a violation of an employer's statutory duty to provide a "healthful" working environment. Moreover, OSHA provides no private right of action for employees who seek to restrict workplace smoking. See *Federal Employees for Nonsmokers Rights v. United States,* cited at note 10; *Barrera v. E. I. du Pont de Nemours,* 653 F.2d 915, 920 (5th Cir. 1981).

[20] 549 F. Supp. 85 (W.D. Wash. 1982).

[21] 29 U.S.C. §§ 701-796i (1982). The Rehabilitation Act imposes affirmative action and nondiscrimination obligations upon a limited group of employers: federal agencies, federal contractors, and recipients of federal assistance.

[22] The *Vickers* court used the terms "hypersensitivity" and "unusually sensitive" interchangeably. See 549 F.Supp. at 87. In medical terms, "hypersensitivity" is defined as "a state of altered reactivity in which the body reacts with an exaggerated response to a foreign agent." Dorland's Illustrated Medical Dictionary 635 (25th ed. 1981).

This term must not be confused with "allergy" or "allergic reaction." To date, no specific antigens have been identified in *tobacco smoke,* and when individuals claim to be "allergic" to smoke, at best, they can be said to suffer from non-specific responses to smoke exposure. See Lehrer, *Tobacco Smoke Sensitivity: A Result of Allergy?* Annals of Allergy 56, May 1986, at 1-10.

[23] The *Vickers* court did not award any injunctive or monetary relief, however, because it found that (1) the employer did not discriminate against plaintiff by reason of his handicap; (2) the employer made reasonable efforts to accommodate plaintiff. 549 F. Supp. at 87-89. For a thorough analysis of the *Vickers* decision, see Comment, *Limited Relief for Federal Employees Hypersensitive to Tobacco Smoke: Federal Employer Who'd Rather Fight May Have to Switch,* 59 Wash.L. Rev. 305, 312-22 (1984). See also *Department of Fair Employment and Hous. v. Fresno County,* FEHC Dec. No. 81-82 (C8-0009 ph) (1984) (employee allergic to tobacco smoke found to be "handicapped" under California Fair Employment and Housing Act).

[24] 42 N.C. App. 225, 256 S.E.2d 477 (1979).

[25] *Alexander v. California Unemployment Ins. Appeals Bd.,* 104 Cal. App. 3d 97, 163 Cal. Rptr. 411 (1980). See also *McCrocklin v. Employment Dev. Dept.,* 156 Cal. App. 3d 1067, 205 Cal. Rptr. 156 (1984) (employee's "good-faith fear" that smoke-filled room was harmful to his health found "reasonable" and employee entitled to unemployment benefits).

[26] *Billman v. Sumrall,* 464 So. 2d 382 (La. App. 1985). But see *Lapham v. Pennsylvania Unemployment Compensation Bd. of Review,* 103 Pa. Commw. 144, 519 A.2d 1101 (1987) (bronchitis sufferer entitled to collect unemployment benefits where proffered physical relocation was deemed not a "reasonable accommodation"); *McCrocklin,* 156 Cal. App. 3d 1067, 205 Cal. Rptr. 156.

hazardous or flammable materials, may constitute a "business necessity."[33] Unless required by statute or ordinance, however, it is unlikely that courts would find that the preferences of co-employees or customers rise to the level of a business necessity.[34] Even so, the court could still find a Title VII violation if the employee proves that there are other alternatives that accomplish the same business purpose, yet have less impact on blacks.[35]

Accordingly, employers need to examine carefully current or proposed workplace smoking restrictions to ensure that they do not discriminate against protected groups. If they do, the employer must be prepared to establish that the smoking policy adopted is justified by legitimate business purposes and is the least drastic means of accomplishing the employer's goals.[36]

Common Law Claims

An employer's general common law duty to provide a reasonably safe working environment for its employees has been codified by federal and state occupational safety and health (OSHA) laws.[37] In an attempt to restrict workplace smoking, employees have filed several lawsuits claiming that such smoking violates this general common law duty. However, only one lower court decision, in New Jersey, *Shimp v. New Jersey Bell Telephone*,[38] has found an employer permitting smoking in the workplace to have violated this duty. The remainder of the courts confronted with this issue have declined to find the duty violated and have refused to restrict workplace smoking. Thus, there is currently little, if any, authority for imposing a common law obligation upon employers to restrict smoking in the workplace.

In *Shimp*, a secretary who claimed to suffer from a severe "allergic" reaction to tobacco smoke sought an injunction to prevent other employees from smoking in her work area. Plaintiff submitted medical opinions in support of her request for an injunction. The employer, on the other hand, failed to put forth any evidence to refute the plaintiff's claims. Not surprisingly, the New Jersey Superior Court found that the employer had a common law duty to provide safe working conditions. Accordingly, it directed the

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[33] A prima facie case is sufficient to prove a Title VII violation, unless contradicted or overcome by other evidence. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

To prove a business necessity, an employer may show that the policy or practice has a "manifest relationship" to performance of the job in question (i.e., that it is a "job related criterion"). Alternatively, the employer may seek to prove that the policy or practice in question is necessary to the safe and efficient operation of the business. "[A] discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge." *Dothard v. Rawlinson*, 433 U.S. 321, 332 n.14 (1977).

[34] See, e.g., *Moore v. Inmont Corp.*, 608 F. Supp. 919, 927 (W.D.N.C. 1985)

[35] See *Rucker v. Higher Educ. Aids Bd.*, 669 F.2d 1179, 1181 (7th Cir. 1982) (employer is forbidden by Title VII to refuse to hire someone on racial grounds because his customers or clientele do not like his race); *Dias v. Pan Am World Airways*, 442 F.2d 385 (5th Cir.), cert. denied, 404 U.S. 940 (1971) (Pan Am violated Title VII when it banned employment of male flight attendants despite passenger preferences for female flight attendants); *Bing v. Roadway Exter.*, 444 F.2d 687 (5th Cir. 1971) (invalidating a motor freight company's rule that an employee who desired to transfer to another job must resign his present position and thereby forfeit accrued employment rights. Finding the rule to have an adverse impact on blacks, the court rejected the company's argument that the rule was "necessitated" by the prospect of employee unhappiness with the demise of the rule). Accord *Jones v. Lee Way Motor Freight*, 431 F.2d 245 (10th Cir. 1970), cert. denied, 401 U.S. 954 (1971).

[36] See *Dothard v. Rawlinson*, cited at note 33. If an employer meets the burden of showing that its tests or selection devices are job-related, the burden then shifts to the complaining party to show that other less discriminatory selection devices would also serve the employer's legitimate interests. See also *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

[37] See 29 U.S.C. §§651-678 (1982) (Federal OSHA). Section 654(a) sets forth the so-called "general duty" clause, which requires that an employer "shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees." See also supra note 19.

See also Cal. Labor Code §§6300-6711 (Deering Supp. 1988) (Cal-OSHA). Section 6400 provides that "[e]very employer shall furnish employment and a place of employment which are safe and healthful for the employees therein."

[38] Cited at note 9.

ees who protest corporate policies permitting smoking. In *Hentzel v. Singer Co.*,[43] a California court held that an employee could state a common law retaliatory dismissal claim after being terminated for protesting hazardous working conditions. The court did so without addressing whether the alleged hazard (environmental tobacco smoke) was, in fact, hazardous.

Overall, the courts have been reluctant to find any common law basis for restricting workplace smoking in the absence of sufficient proof that environmental tobacco smoke causes significant medical harm to nonsmokers.[44] With the exception of the now dated and criticized 1976 *Shimp* decision, the courts have declined to expand an employer's common law duty to provide a safe working environment to encompass a smoke-free working environment.

In 1986, in *Bernard v. Cameron & Colby Co.*, a Massachusetts court rejected a nonsmoker's claim against her employer based on breach of contract and intentional and negligent infliction of emotional distress.[45] But, in *McCarthy v. Department of Social and Health Servs.*, the Washington Supreme Court recently held that an employee who allegedly developed lung disease as a result of exposure to tobacco smoke in the workplace was not preempted by workers' compensation laws from stating a cause of action against her former employer for negligence.[46] This finding is inconsistent with existing labor law precedents. While four justices opined in dicta that employers have a common law duty to provide a smoke-free work environment, that conclusion was specifically rejected by a majority of the court.[47] Indeed, several courts that have addressed the issue to date have recognized the need to consider the interests of both smokers and nonsmokers.[48]

Workplace Smoking Legislation

In addition to analyzing case law, the workplace smoking issue demands a careful review of relevant state and local legislation.[49] Thirteen states to date have enacted legislation specifically regulating smoking in private workplaces. These are: (1) Connecticut; (2) Florida; (3) Iowa; (4) Maine; (5) Minnesota; (6) Montana; (7) Nebraska; (8) New Hampshire; (9) New

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[43] 138 Cal. App. 3d 290, 188 Cal. Rptr. 159 (1982).

[44] In fact, no link has been shown between ETS and chronic adverse health effects. Both the Surgeon General and the National Academy of Sciences found that available studies preclude any firm conclusion about the relationship between exposure to ETS and cardiovascular disease and that further studies are needed to determine whether any real link exists. See, e.g., Surgeon General's Report, cited at note 7, at 14; NAS Report, cited at note 12, at 11. In addition, the Surgeon General's report concluded that "a previously healthy individual would not develop chronic lung disease solely on the basis of involuntary tobacco smoke exposure in adult life." Surgeon General's Report, supra note 12, at 62. Finally, both the Surgeon General and the National Academy of Sciences reports emphasize critical limitations on their finding of a possible connection between exposure to ETS and lung cancer. Upon reviewing the same evidence considered by the NAS and the Surgeon General, the International Agency for Research on Cancer of the World Health Organization concluded, in 1986, that the available evidence is equally consistent with the finding of an increase in risk or absence of risk. IARC Monograph, cited at note 12, at 308. A number of other studies published since 1986 also contradict the limited findings of the Surgeon General and NAS reports with respect to the purported relationship between ETS and lung cancer. See, e.g., Proceedings, supra note 12, at 242-50, 252-58.

[45] *Bernard v. Cameron & Colby Co.*, 397 Mass. 320, 491 N.E.2d 604 (1986).

[46] Cited at note 10.

[47] *Id.* (Brachtenbach, J., dissenting). In a statement issued by the Washington State Attorney General's office, a spokesperson for the attorney general said that the dicta of the three justices in *McCarthy* did not establish binding law on the issue of an employer's duty to provide a "reasonably safe" workplace. 26 Governmental Employment Relations Report 1172 (Aug. 1988). A trial on the merits in *McCarthy* is scheduled for October, 1989.

[48] See *Shimp v. New Jersey Bell Tel.*, cited at note 9; *Gordon v. Raven Sys. & Research*, 462 A.2d 10, 15 (D.C. App. 1983); *McCarthy*, cited at note 10.

[49] There is no federal legislation regulating smoking in private workplaces. The United States government has, however, adopted smoking restrictions covering the 6,800 buildings controlled by the General Services Administration. These restrictions apply to approximately 890,000 federal employees. See 41 C.F.R. Part 101-20.105-3. In addition, the Federal Labor Relations Authority has recently restricted the ability of several federal agencies to change smoking policy without first negotiating with bargaining units. *Treasury Employees Union Chapter 250*, 33 FLRA No. 8, 61-74 (Before Calhoun and McKee) (Oct. 13, 1988), Nos. 0-NG-1524, 0-NG-1536 and 0-NG-1545.

limit management's discretion. These laws generally dictate which portions of the workplace must be designated as no-smoking areas. Also, these laws usually specify the percentage of space in employee cafeterias, lunchrooms, and lounges that must be reserved for nonsmokers. In some instances, these most intrusive laws give nonsmoking employees superior rights over smokers. For example, the local ordinance in Palo Alto, California, provides that "[i]n any dispute arising under the policy, the rights of the nonsmoker shall be given precedence."[55]

Objections to Legislation

The primary and most obvious objection to legislative enforcement of workplace smoking is that it usurps the ability of employers to deal individually with employee concerns as they arise. Legislation does not add to management's bevy of rights; rather, such legislation takes away the considerable flexibility employers have historically enjoyed in this area. In addition, there are numerous other potential objections to legislation covering workplace smoking.

First, smoking laws, like workplace smoking policies, can be difficult to enforce. Regardless of whether this responsibility is placed on the employer or some governmental body, such as a law enforcement agency or local health department, limited resources and personnel make rigorous enforcement of workplace smoking laws unlikely. Second, because workplace smoking is generally considered to be a *mandatory* subject of bargaining, legislative restrictions may create conflicts between employers and unions. Third, restrictions imposed by smoking legislation may interfere with worker efficiency. For example, where compliance with the law requires employers to rearrange work areas or segregate smoking and nonsmoking employees, an employer's operations may be disrupted and productivity decreased.[56] Fourth, smoking laws that give nonsmokers unlimited power to dictate the company policy for all workers are likely to be perceived as unfair by others, especially employees who smoke. For instance, a local ordinance in San Francisco allows even one employee to veto an employer's smoking policy in that employee's "office workplace."[57] These types of policies will undoubtedly create resentment among some employees and foster the perception that employers unfairly favor nonsmokers.[58] Fifth, where legislation requires employers to physically separate smokers and nonsmokers, employers may experience a loss of managerial freedom. Finally, some state or local laws regulating smoking in the workplace are likely to be challenged on constitutional or other grounds, and may thus embroil employers in resulting litigation.[59]

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[55] Palo Alto Municipal Code, ch. 9.14, effective Feb. 1, 1984.

[56] According to one study, of those employers polled who have implemented smoking restrictions, seven percent responded that their policies have had a notable effect on company costs. Eight percent indicated that employee productivity increased, while three percent reported that their restrictions had a detrimental effect on employee productivity. BNA, Special Report, supra note 1, at 22-23. For an economist's view of the "social costs" of smoking, including lost production, workplace efficiency, and absenteeism, see R. Tollison & R. Wagner, *Smoking and the State* ch. 3 (1988).

[57] San Francisco Municipal Health Code, Smoking Pollution Control Ordinance No. 298-83 (Proposition P), effective Mar. 1, 1984.

[58] Thus far, employee sentiments about smoking policies have been mixed. Overall, 42 percent of recent survey respondents said the smokers think their policy is "about right," while 33 percent indicated the rules were too restrictive; 53 percent of firms with policies said that nonsmokers were satisfied, while 33 percent said nonsmokers wanted tougher restrictions. BNA, Special Report, supra note 1, at 23.

Press accounts of employee sentiment are decidedly mixed as well. See *Do You Smoke? Drink? If So, Some Employers Say, You May as Well Stay Home*, Business First-Columbus, vol. 3, no. 36, § 2, at 3; *The Company Is Watching You Everywhere*, N.Y. Times, Feb. 15, 1987, § 4, at 21, col. 2, (Editorial Desk); *Some Workers Upset by Company Smoking Ban*, AP, Jan. 21, 1987; *Bans, Red Ink: Smoking: A Burning Issue*, L.A. Times, Nov. 21, 1985, § 1, at 1, col. 1, (Metro Desk); *Where There's Smoke, There's Ire: After Years on the Defensive, Smokers Fight Back*, L.A. Times, Jan. 14, 1988, § 4, at 1, col. 1.

[59] The primary challenge is that smoking laws are often too vague to set definite standards of compliance for employers. Indeed, several smoking ordinances have already

a recognized right or privilege of employment.

This issue was discussed in *In re Parker Pen U.S.A.*[65] In this case, the employer, who had permitted on-the-job smoking for over twenty years, unilaterally abolished employee smoking rights that were guaranteed under the collective bargaining agreement. The employer allegedly did so for health reasons after receiving the Surgeon General's 1986 report on involuntary smoking. In resolving an employee grievance, the arbitrator held that "both parties have an interest in addressing the profound issue raised by the employer concerning the safety of the workplace." Accordingly, the arbitrator invalidated the employer's smoking ban until any changes could be bargained over during upcoming negotiations.

Even where the employer is required to impose smoking restrictions pursuant to state statute or local ordinance, it should bargain over all discretionary aspects of the rule. There are no "smoking policy" cases directly on this point. The institution of a smoking policy would constitute a "term and condition" of employment and, therefore, be a mandatory subject of bargaining. Nevertheless, neither union nor management may require the other to agree to provisions that are unlawful or prohibited.[66] Thus, proposed or existing provisions that directly conflict with legislation automatically become illegal or unenforceable.[67] Legislation that provides employers with discretion, however, such as that which simply requires employers to "adopt" a smoking policy, would not be affected. That is, the particular discretionary aspects of the policy would still be a mandatory subject of bargaining. In practice, bargaining will be routinely required because most workplace smoking laws leave a considerable amount of discretion to employers.[68]

Even if the unilateral implementation of a smoking policy does not violate the NLRA, it may nonetheless violate the collective bargaining agreement. Arbitral decisions have consistently stated that to be valid, an employer rule must be reasonable under the circumstances and nondiscriminatory in application.[69] Arbitrators have struck down employer smoking policies that fail to meet this standard.

In *Union Sanitary District*, the arbitrator found that the employer could not unilaterally prohibit employees from smoking in their offices. Specifically, the arbitrator found that the absolute prohibition was arbitrary because there was no adequate basis for the rule. Although the employer stated it wanted to protect nonsmoking employees, the evidence showed there were only two bargaining unit members in the building who smoked. Furthermore, for six hours a day, they were not in their offices but were out in the field, and no one complained about the smoking. Moreover, the California Indoor Clean Air Act of 1976, which the employer cited to justify its ban, did not require a ban on smoking. Rather, that Act contemplates a relatively flexible regulation of smoking which recognizes the rights of both smokers and nonsmokers.[70]

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[65] 90 Lab. Arb. (BNA) 489 (1987) (Fleischli, Arb.).

[66] *Meat Cutters Local 421*, 81 N.L.R.B. 1052 (1949); *Borg-Warner v. NLRB*, 356 U.S. 342, 34 LC ¶ 71,492 (1958).

[67] *Hughes Tool Co.*, 147 N.L.R.B. 1573 (1964); *Savannah Printing Specialties & Paper Prod. Local 604 v. Union Camp Co.*, 50 F. Supp. 632, 70 LC ¶ 13,542 (S.D. Ga. 1972).

[68] For example, the New Hampshire law, cited at supra text accompanying note 54, merely directs the employer to adopt a smoking policy. All of the specifics are left to the discretion of each individual employer.

[69] See *United Tele. Co. of Florida*, 78 Lab. Arb. (BNA) 865 (1982)(designation of no-smoking table in cafeteria upheld as reasonable in light of company's and union's interests in maintaining a healthy work environment and minimizing expenses and potential liability); *H-N Advertising & Display Co.*, 88 Lab. Arb. (BNA) 329 (1986), 88 Lab. Arb. (BNA) 1311 (1987) (rule banning smoking in area of plant where combustibles are stored was reasonable and nondiscriminatory where worker safety was primary reason for expanding rule, and implementation of measures to improve safety is normally management prerogative). See also supra note 64.

[70] *Union Sanitary District*, cited at note 64. CAL. HEALTH & SAFETY CODE § 25940-25947 (Deering 1988). See also *Schien Body & Equip. Corp.*, cited at note 64

Drafting a Smoking Policy

In jurisdictions where workplace smoking is governed by a state statute or local ordinance, employers must conform their policies and practices to the law. In some circumstances, this may require employers to adopt a formal smoking policy. In the vast majority of jurisdictions, however, employers are still free to decide whether a smoking policy is necessary or appropriate. In doing so, employers may want to evaluate whether there is a predicate for action. In this regard, they may find it useful to survey their employees to see if there is a consensus of opinion. Management may also want to consult its labor unions, if any.

Should a company decide that a formal written policy is necessary, the specifics of the policy will naturally depend upon the individual aspects of the workplace. Because of local differences, particularly in those companies with decentralized decision-making, some companies have developed a smoking policy applicable to only some divisions, offices, or plants. Other employers have adopted a smoking policy in response to a specific problem or where they are governed by a particular local ordinance. In addition, companies tend to vary their smoking policies depending upon the degree of specificity desired. A less specific smoking policy aimed at promoting cooperation and consideration might, for example, state:

"It is our policy to make every reasonable effort to accommodate all employees within the constraints imposed by our physical structure and financial resources. It is our firm conviction that the wishes of smokers and nonsmokers can best be resolved through cooperation, dialogue, and common courtesy. Should a dispute or concern arise, management and employees should work together to seek a reasonable resolution consistent with this policy." A nonspecific policy such as this will increase flexibility and allow management to resolve individual disputes on a case-by-case basis.

In contrast, some employers may opt for a smoking policy with a greater degree of specificity. For instance, the employer may want to designate particular smoking or nonsmoking areas or workstations. The specific locations covered may include: private offices, hallways, conference rooms, lunch rooms, restrooms, and auditoriums. If enforced in an arbitrary or discriminatory manner, a smoking policy may subject an employer to potential liability. Indeed, inequitable enforcement could foster employee discontent and possibly support claims premised on breach of contract or tort claims against employers or individual supervisors.[74]

Smoking bans, while rare, pose more serious problems.[75] This is especially true if they proscribe off-duty behavior. In addition to employee morale problems, these bans are likely to give rise to a morass of legal claims.[76] For these reasons, employers should be extremely cautious before considering a total ban on workplace smoking.

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[74] See *Carroll v. Tennessee Valley Auth.*, 697 F.Supp. 508 (D.D.C. 1988) (public employer not shielded from potential tort liability under "official immunity" doctrine, because supervisor who failed to enforce smoking policy acted outside course and scope of his employment). In *Carroll*, the plaintiff claimed that she had developed lung disease allegedly from exposure to environmental tobacco smoke on the job. In addition, she alleged that her supervisors took reprisals against her by giving her poor performance evaluations, assigning her demeaning work, and questioning the seriousness of her health claims. On November 1, 1988, this case was settled for an undisclosed sum of money.

[75] The vast majority of employers with smoking policies do not ban smoking entirely. As noted above, those who do typically do so due to product (food) contamination concerns or because flammable materials are produced or stored in the workplace. And few (five percent) give hiring preference to nonsmoking job applicants. BNA, Special Report, supra note 1, at 17, 22. One notable exception pertains to police and fire departments, which are faced with unique workers' compensation issues. See supra notes 15-18 and accompanying text. See also *Bans, Red Ink: Smoking: A Burning Work Issue*, supra note 90 (Pacific Northwest Bell bans smoking in all facilities; Radar Electric of Seattle will not hire smokers; Capital City Products conducts seminars to help employees quit smoking).

[76] For a thorough discussion of smoking bans, see Rothstein, supra note 15, at 940.